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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

JOE DOUGLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether the court of appeals erred by issuing a writ of mandamus striking down arbitration and class action waiver provisions in an arbitration agreement in direct violation of the Best Evidence Rule and by creating a new procedure for deciding "arbitrability" later in the litigation process while shifting the burden to the party seeking arbitration to prove an absence of unconscionability.

II. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Talk America Inc. is a wholly owned subsidiary of Talk America Holdings, Inc., itself a wholly owned subsidiary of Cavtel Holdings, LLC, which is in turn a wholly owned subsidiary of Cavalier Telephone Corporation. No publicly held corporation owns more than 10% of the stock of Talk America Inc.

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III. PETITION FOR WRIT OF CERTIORARI

Petitioner Talk America Inc. respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit decided July 18, 2007, which was denied review by the Ninth Circuit on August 29, 2007.

IV. OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued the Opinion on July 18, 2007, which may be found at 495 F.3d 1062 (9th Cir. 2007). (App. 1-11). The Court of Appeals' decision issued a writ of mandamus relating to an order entered by the United States District Court for the Central District of California, which is unreported. (App. 15-27).

V. STATEMENT OF JURISDICTION

The Court of Appeals' opinion was issued on July 18, 2007. On August 29, 2007, the Court of Appeals entered an order denying rehearing *en banc*. This petition is filed within ninety (90) days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

VI. STATUTORY PROVISIONS INVOLVED

A. The Federal Arbitration Act, 9 U.S.C. §§ 2-4, 16

Except as otherwise provided in Section 1292(b) of Title 28, an appeal may not be taken from an interlocutory order

> (1) granting a stay of any action under section 3 of this title

9 U.S.C. § 16(b)

B. The All Writs Act, 28 U.S.C. § 1651(a)

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

C. Federal Rule of Evidence 1002

> "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided by these rules or Act of Congress."

VII. STATEMENT OF THE CASE

A. Introduction

Continuing California's long history of antagonism toward arbitration, the United States Court of Appeals for the Ninth Circuit granted a writ of

mandamus eliminating application of the Best Evidence Rule to arbitration contracts and authorizing a sophisticated businessman the right to avoid arbitration *literally* by merely declaring he *recalled* a different written agreement than the one before the district court containing an arbitration clause.

Plaintiff neither proffered the other alleged written agreement nor sought leave from the district court to locate and submit it. The district court properly interpreted the only written contract before it and ordered arbitration in accordance with its terms. Remarkably, the Ninth Circuit accepted Plaintiff's description of a prior alleged written agreement and vacated the order compelling arbitration finding without any basis in the record that *defendant* sought to "change the terms" of the written contract between the parties.

The Ninth Circuit's order is in direct conflict with other federal courts of appeal and contrary to well-established precedent in this Court on numerous grounds, including:

1. Improper Standard of Review

In contravention of the explicit statutory directive of Congress in 9 U.S.C. § 16(b) prohibiting appeals from interlocutory orders compelling arbitration, the Ninth Circuit issued a writ of mandamus on the ground the district court purportedly erred in applying California law by enforcing the only written contract before it and ordering arbitration in strict accordance with its

terms. The standard of review applied by the Ninth Circuit is in conflict with other courts of appeal, which require a petitioner to establish a "clear abuse of discretion," "clear and indisputable right" to mandamus relief or a showing the district court "clearly overstep[ped] its authority" before 9 U.S.C. § 16(b) can be ignored. *Steele v. L.F. Rothschild & Co., Inc.*, 864 F.2d 1 (2d Cir. 1988); *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993). Unlike the Ninth Circuit, other courts of appeal properly hold an alleged misapplication of state law generally must be addressed by direct appeal and is an insufficient basis for granting extraordinary relief by mandamus. *Id.*

2. Special Treatment for Arbitration Agreement

Contrary to well-established precedent of this Court which prohibits lower courts from "invalidat[ing] arbitration agreements under state laws applicable only to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Ninth Circuit created a new evidentiary paradigm, including a new standard of review, procedure and burden of proof for proving formation of arbitration agreements, different than other contracts governed by California law. Unlike other contract claims in California, the Ninth Circuit vacated the district court's order compelling arbitration and accepted Plaintiff's recollection of the alleged terms of an undisclosed written agreement as the applicable contract between the parties in direct contravention of the Best Evidence Rule.

3. Delayed Arbitrability Determination

In direct conflict with this Court's instruction "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), the Ninth Circuit created a new rule that determination of whether an arbitration clause should be enforced "depends on facts and circumstances developed during the course of litigation." (App. 8).

4. Appellate Court Findings of Fact

In contravention of basic black-letter law, the Ninth Circuit failed to recognize findings of fact made by the district court and improperly made its own findings of fact as an appellate court sitting in mandamus. The Ninth Circuit's action is contrary to the decision of this Court and every other known federal court of appeals addressing this issue. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("[T]he Court of Appeals was mistaken to engage in . . . factfinding."); *United States v. Griesa*, 481 F.2d 276, 278 n.2 (2d Cir. 1973) ("[S]upervisory mandamus is particularly ill-suited as a method of policing district court decisions that turn on issues of fact.").

5. Class Action Waiver – Split of Authority

Contrary to decisional law from at least four other federal courts of appeals (Third, Fourth, Fifth

and Eighth Circuits) and several state supreme courts,[1] but arguably in conformity with at least one other federal court of appeal and other state supreme courts,[2] the Ninth Circuit has refused to follow this Court's precedent in enforcing an arbitration agreement under 9 U.S.C. § 4 despite the parties' agreement to preclude class actions. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (noting an arbitration agreement may be enforced "even if the arbitration could not go forward as a class action . . . "). Panels of the United States Court of Appeals for the Eleventh Circuit have reached opposite conclusions on this issue.[3]

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[1] *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005); *Stenzel v. Dell, Inc.*, 870 A.2d 133 (Me. 2005) (Texas law); *Brown v. KFC National Management Co.*, 921 P.2d 146, 167 n.23 (Haw. 1996).

[2] *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007-08 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 271-74 (Ill. 2006); *Muhammad v. County Bank*, 912 A.2d 88, 100-02 (N.J. 2006).

[3] *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2020, 164 L. Ed. 2d 779 (2006) (upholding arbitration provision with class action waiver); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 817-18 (11th Cir. 2001) (same); cf. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223-24 (11th Cir. 2007) (distinguishing *Caley*, striking down arbitration clause with class action waiver as unconscionable).

6. Improper Application of Mootness Doctrine

In direct conflict with decisional law of this Court, the Ninth Circuit improperly granted mandamus relief on the ground Douglas's "individual claim would be rendered moot" if he "[won] the arbitration and [was] awarded all the damages he asks for." (App. 9); *compare United States Parole Commission v. Geraghty*, 445 U.S. 388, 397-98 (1980) ("[A case or controversy] may exist . . . even though the claim of the named plaintiff has become moot."); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

7. *Prima Paint* Issue

Contrary to this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967), that a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator, the Ninth Circuit improperly granted mandamus relief striking down the arbitration clause based upon its conclusion that a *separate* contract provision, namely, the class action waiver clause, "may be" unconscionable under California law. (App. 8).

Talk America respectfully submits this Court should grant its petition for writ of certiorari and resolve the important questions presented by this appeal.

B. In General

1. Douglas's Background

Plaintiff Joe Douglas ("Douglas") is a sophisticated sports agent who represents famous sports figures, including Olympian Carl Lewis, in negotiations with companies such as Coca-Cola.

On August 11, 2006, Douglas brought an action against Talk America, a long distance telephone service provider, claiming breach of a "written" contract on grounds Talk America allegedly misled Douglas in connection with a telephone billing statement issued in August 2005 (ER0001).[4] In his First Amended Complaint, among other things, Douglas sought to serve as a representative for a national class of consumers (ER0005).

Contrary to Douglas's assertions, the telephone number identified in the First Amended Complaint is not used by him as a consumer but is the *commercial* facsimile number of one of Douglas's attorneys (ER0001 and ER0082). Indeed, the telephone number at issue is shown on the cover page of the First Amended Complaint under the name of Douglas's attorney, David Greifinger (ER0001) (facsimile number (310) 450-4715).

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[4] Pursuant to Supreme Court Rule 12.7, Talk America cites to the certified record.

2. Written Contract

In his First Amended Complaint, Douglas admits "[o]n or before July 18, 2005, [Douglas and Talk America] *entered into a written* telephone service contract" (ER0011) (emphasis added). Talk America submitted to the district court a "written telephone service contract" known as a Consumer Service Agreement ("CSA"), which included class action waiver, arbitration and choice-of-law provisions (ER0060-66). Pursuant to the terms of the CSA, an arbitration between Douglas and Talk America could be held for as little as $20.00 and could be conducted entirely online, by mail or at a location in California, Douglas's home state (ER0069-81).

After Talk America submitted the CSA to the district court, Douglas declared he did "not *recall* any class action waiver, arbitration or New York choice-of-law provisions" in the written contract with Talk America and that he allegedly had not "seen" the CSA (as opposed to knowing of its existence) (ER0121) (emphasis added). Douglas did not proffer any different written contract or seek leave to take discovery to locate and present a different written agreement to the district court.

Properly addressing the only written contract before it, the district court made factual findings that (a) "[Douglas] acknowledge[d] the existence of an agreement with Talk America"; and (b) Douglas "further acknowledge[d]" the CSA states that use of Talk America's service *alone* creates an agreement

with regard to the "terms" in the written telephone service agreement (ER0183) (emphasis added).

VIII. REASONS FOR GRANTING THE WRIT

A. Subjecting Arbitration Agreements to a Newly Created Exception to the Best Evidence Rule

Rule 1002 of the Federal Rules of Evidence provides, "[t]o prove the content of a writing . . . the original writing . . . is required, except as otherwise provided by these rules or Act of Congress." The Best Evidence Rule applies "when a witness seeks to testify about the contents of a writing . . . without producing the physical item itself." *United States. v. Bennett*, 363 F.3d 947, 953 (9th Cir. 2004). *See Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*, 428 F.3d 214 (5th Cir. 2005) (affirming an order excluding *testimony* as to the terms of a written contract as violative of Best Evidence Rule).

This Court has recognized under California law "the burden of justifying a departure from a contract's written terms generally rests with the party seeking the departure." *UNUM Life Ins. Co. of America v. Ward,* 526 U.S. 358, 371 (1999); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000). The party resisting arbitration bears the burden of showing the arbitration provision is invalid or does not encompass the claims at issue. *Id.*

In conformity with the Best Evidence Rule, the district court evaluated the only "written" contract

before it and rejected Douglas's unsupported recollection of the terms of an unknown and unsubstantiated contract not presented to the district court.

The Ninth Circuit's creation of an exception to applying the Best Evidence Rule to arbitration contracts stands in sharp contrast to this Court's admonition that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687 (citations omitted).

The Ninth Circuit's abandonment of the Best Evidence Rule for arbitration agreements, respectfully, also makes poor policy. This approach runs counter to almost every modern policy pronouncement of this Court regarding enforcement of arbitration agreements and will only result in a slew of mandamus petitions being filed seeking to vacate arbitration orders on the basis of hypothetical written agreements manufactured in the minds of those seeking to avoid arbitration.

B. Delay of the Arbitrability Decision

The Ninth Circuit also improperly created a new standard and timetable for determining whether an arbitration provision is unconscionable by requiring the district court to delay such determination until after "the facts and circumstances [have] developed during the course of litigation." (App. 8). This new paradigm is directly contrary to the Court's recent decision in *Buckeye Check Cashing, Inc. v. Cardegna*,

rejecting an almost identical argument. 546 U.S. 440, 448-49 (2006) ("[I]t is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum – and resolved it in favor of the separate enforceability of arbitration provisions.").

Here, the Ninth Circuit held that because a "class action waiver provision . . . *may be* unconscionable in California," the parties to such contracts no longer have the right to arbitrate their disputes until they proceed through the "course of litigation" to determine whether the clause is unconscionable. Such a procedure plainly runs afoul of this Court's clear instruction "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

C. Findings of Fact by the Ninth Circuit

The Ninth Circuit acting on its own initiative made a finding of fact that the terms of the written contract between Talk America and Douglas were "change[d]" (App. 1). The district court understandably made no such finding because there was no prior written contract presented by Douglas to the district court by which to evaluate any alleged "change." Misusing the office of mandamus, the Ninth Circuit overreached in making its own finding of fact on this critical issue.

The Ninth Circuit's statement of the issue as whether a service provider can "unilaterally *change* the terms of a contract . . . [without] the other party's consent" only highlights the Ninth Circuit's improper attempt to make findings of fact as to the existence and terms of a written contract not before the district court. There was only one written contract before the district court. The Ninth Circuit's comparison of the CSA to an undisclosed, hypothetical contract to determine whether any "change" occurred was clearly contrary to law.

As this Court has held in an analogous context,

> If the Court of Appeals believed that the District Court had failed to make findings of fact on this critical issue essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

The Ninth Circuit's attempt to make findings of fact relative to an alleged "change" in contract terms

when there was no evidence before the district court to support such a finding was clearly in error. Even more, the Ninth Circuit went far beyond the office of mandamus in vacating the district court's order when at a minimum there were issues of material fact in the record.[5]

D. Status of Douglas's Right To Obtain Review of the District Court's Decision After Arbitration

The Ninth Circuit granted mandamus relief because it found Douglas had "no other adequate means" of ensuring he could continue as a class representative and he would be "prejudiced in a way not correctable on appeal" because his "individual claim would be rendered moot" if he "[won] the arbitration and [was] awarded all the damages he asks for." (App. 9). The Ninth Circuit's opinion is in error and contrary to well-established decisional law of this Court.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397-98 (1980), this Court recognized

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[5] Based on Douglas's admission in his First Amended Complaint, the district court found a written agreement between Douglas and Talk America existed, but it properly did not – because it could not – address whether there was any "change" in the written contract because no such evidence was properly before the court. The district court considered whether Douglas had received a hard copy of the written agreement and properly found the issue was not controlling (ER0184). The Ninth Circuit sitting in mandamus had no authority to rewrite the district court's findings of fact.

that a case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." Similarly, the Court determined that a named representative retained a right to appeal a denial of class certification ruling even though his individual claims were satisfied. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

The Ninth Circuit's decision to grant mandamus relief to Douglas because he allegedly could "moot" his claim and lose the opportunity to continue as a class representative was in error. Douglas will lose no right to appeal the district court's order requiring him to arbitrate his individual claim even if his own claim is satisfied after arbitration.

Contrary to the decisions of other courts of appeal, the Ninth Circuit was in error for claiming Douglas was entitled to mandamus relief when any alleged error by the district court could be reviewed on direct appeal. *Compare Communication Workers of America, AFL-CIO v. American Tel. & Tel. Co.*, 932 F.2d 199, 213 (3d Cir. 1991) ("[T]hat AT & T may have to arbitrate before taking this appeal is not a basis for mandamus."); *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993) ("[Mandamus] is particularly heavy, because Congress has expressly limited interlocutory review of a district court decision on arbitration.").

IX. CONCLUSION

This Court should grant Talk America's writ of certiorari for at least the following six reasons: (1) to resolve a dispute in the courts of appeal regarding the applicable standard of review for vacating orders compelling arbitration by writ of mandamus under the All Writs Act and Federal Arbitration Act; (2) to resolve a deep division in the courts of appeal and state supreme courts regarding enforcement of class action waiver provisions; (3) to reject the new pronouncement by the Ninth Circuit authorizing lower courts to revoke application of the Best Evidence Rule to arbitration agreements; (4) to reject the Ninth Circuit's new paradigm for determining arbitrability "during the course of litigation"; (5) to reinforce that claims of unconscionability beyond an arbitration clause alone are to be resolved by the arbitrator, not the court; and (6) to correct other misstatements of law by the Ninth Circuit, including its contention of mootness of a class action after arbitration as described herein.

For the reasons set forth above, Talk America respectfully requests this Court grant its petition for a writ of certiorari to review this important case.

Dated this 27th day of November, 2007.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated, Petitioner, v. **UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,** Respondent, **TALK AMERICA INC., a Pennsylvania corporation,** Real Party in Interest.	No. 06-75424 D.C. No. CV-06-03809-GAF **OPINION**

On Petition for Writ of Mandamus
to the United States District Court
for the Central District of California

Argued and Submitted June 7, 2007

(Filed Jul. 18, 2007)

Before: **KOZINSKI**, **GOULD** and **CALLAHAN**, Circuit Judges.

PER CURIAM:

We consider whether a service provider may change the terms of its service contract by merely posting a revised contract on its website.

Facts

Joe Douglas contracted for long distance telephone service with America Online. Talk America subsequently acquired this business from AOL and continued to provide telephone service to AOL's former customers. Talk America then added four provisions to the service contract: (1) additional service charges; (2) a class action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law. Talk America posted the revised contract on its website but, according to Douglas, it never notified him that the contract had changed. Unaware of the new terms, Douglas continued using Talk America's services for four years.

After becoming aware of the additional charges, Douglas filed a class action lawsuit in district court, charging Talk America with violations of the Federal Communications Act, breach of contract and violations of various California consumer protection statutes. Talk America moved to compel arbitration based on the modified contract and the district court granted the motion. Because the Federal Arbitration Act, 9 U.S.C. § 16, does not authorize interlocutory appeals of a district court order compelling arbitration, Douglas petitioned for a writ of mandamus.

Analysis

Because a writ of mandamus is an extraordinary remedy, we have developed five factors that cabin our power to grant the writ:

1. "The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires."

2. "The petitioner will be damaged or prejudiced in a way not correctable on appeal."

3. "The district court's order is clearly erroneous as a matter of law."

4. "The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules."

5. "The district court's order raises new and important problems, or issues of law of first impression."

Bauman v. U.S. Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

The third factor is a necessary condition for granting a writ of mandamus. *Executive Software N. Am., Inc. v. U.S. Dist. Court,* 24 F.3d 1545, 1551 (9th Cir. 1994). But "all five factors need not be satisfied at once." *Valenzuela-Gonzalez v. U.S. Dist. Court,* 915 F.2d 1276, 1279 (9th Cir. 1990). If the district court clearly erred, we determine whether the four additional factors "in the mandamus calculus point in favor of granting the writ." *Executive Software,* 24 F.3d at 1551.

1. Douglas alleges that Talk America changed his service contract without notifying him. He could only have become aware of the new terms if he had

visited Talk America's website and examined the contract for possible changes. The district court seems to have assumed Douglas had visited the website when it noted that the contract was available on "the web site on which Plaintiff paid his bills." However, Douglas claims that he authorized AOL to charge his credit card automatically and Talk America continued this practice, so he had no occasion to visit Talk America's website to pay his bills. Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side.[1] Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. *Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 549 F.2d 114, 118 (9th Cir. 1976). This is because a revised contract is merely an offer and does not bind the parties until it is accepted. *Matanuska Valley Farmers Cooperating Ass'n v. Monaghan*, 188 F.2d 906, 909 (9th Cir. 1951). And generally "an offeree cannot actually assent to an offer unless he

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[1] Nor would a party know *when* to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, an examination would be fairly cumbersome, as Douglas would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed.

knows of its existence." 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:13, at 365 (4th ed. 1990); *see also Trimble v. N.Y. Life Ins. Co.*, 255 N.Y.S. 292, 297 (App. Div. 1932) ("An offer may not be accepted until it is made and brought to the attention of the one accepting."). Even if Douglas's continued use of Talk America's service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes. Douglas claims that no such notice was given.

Crawford v. Talk America, Inc., No. 05-CV-0180-DRH, 2005 WL 2465909, at *4 (S.D. Ill. Oct. 6, 2005), and *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1103-06 (C.D. Cal. 2002), on which the district court relied, are not to the contrary. The customers in these cases received notice of the modified contract by mail. The service provider in *Bischoff* mailed the contract to the customer, 180 F. Supp. 2d at 1101, and the service provider in *Crawford* gave notice to the customer that she could see the contract terms online or call the service provider to learn of the terms. 2005 WL 2465909, at *3 n.3. Furthermore, *Crawford* and *Bischoff* involved new customers who necessarily would be on notice that they were required to assent to contract terms as a predicate for using the service. By contrast, the California Court of Appeal has held that a *revised* contract containing an arbitration clause is unenforceable against existing customers, even when they are given notice by mail. *Badie v. Bank of Am.*, 67 Cal.App.4th 779, 801 (Ct. App. 1998).

The district court thus erred in holding that Douglas was bound by the terms of the revised contract when he was not notified of the changes. The error reflects fundamental misapplications of contract law and goes to the heart of petitioner's claim. It would alone be sufficient to satisfy the third *Bauman* factor, but the district court also committed two additional errors. Even if Douglas were bound by the new terms of the contract (which he is not for the reasons already explained), the new terms probably would not be enforceable in California because they conflict with California's fundamental policy as to unconscionable contracts.[2] In New York, as in California, a contract is

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[2] Under the Federal Arbitration Act (FAA), 9 U.S.C. § 2, "[a]rbitration agreements ... are subject to all defenses to enforcement that apply to contracts generally." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003). Thus, "[t]o evaluate the validity of an arbitration agreement, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Such state-law principles come from the law of a particular state – not federal general common law under the FAA. *See First Options*, 514 U.S. at 944. Here, Douglas has raised the state law defenses of lack of contract formation and unconscionability, so we must determine which state's law applies.

The FAA "does not create any independent federal-question jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The district court exercised supplemental jurisdiction in this case. When a federal court exercises supplemental jurisdiction, "the federal court applies the choice-of-law rules of the forum state," which in this case is California. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996).

(Continued on following page)

unconscionable only if it is both procedurally and substantively unconscionable. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000); *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988). That's where the similarities end. The district court erred in analyzing California law as to both procedural and substantive unconscionability.

The district court held that the arbitration clause in the modified contract is not procedurally unconscionable (and therefore enforceable) because Douglas had meaningful alternative choices for telephone service. Under New York law this choice forecloses any procedural unconscionability claim. *See Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div.

Under California's choice-of-law rules, the district court may not enforce the choice-of-law provision pointing to New York law if (1) New York's substantive law is contrary to a fundamental policy entrenched in California's substantive law and (2) California has a "materially greater interest" than New York in determining the issue. *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 916-17 (2001) (quoting Restatement (Second) of Conflict of Laws § 187(2)). To determine which state has the materially greater interest, we look to the domicile of the parties and the place of the wrong. *See Reich v. Purcell*, 67 Cal. 2d 551, 555 (1967). California certainly has an interest in protecting the thousands of citizens in the California subclass of this class action from unconscionable contracts. And this interest is materially greater than New York's interest because Talk America is a Pennsylvania corporation with its principal place of business in Pennsylvania. Therefore, if New York law conflicts with a fundamental policy of California, the choice-of-law provision cannot be enforced and California law would apply.

2003). However, after the district court made its ruling, we noted that California "has rejected the notion that the availability ... of substitute ... services *alone* can defeat a claim of procedural unconscionability." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006) (en banc). In California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer – even if the customer has a meaningful choice as to service providers. *Id.* at 1284.

Likewise, the district court held that the class action waiver provision is not substantively unconscionable. Such waivers aren't substantively unconscionable under New York law. *See Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div. 2006); *Tsadilas v. Providian Nat'l Bank,* 786 N.Y.S.2d 478, 480 (App. Div. 2004); *Ranieri,* 759 N.Y.S.2d at 449. The district court cited *Provencher v. Dell, Inc.,* 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006), for the proposition that California law was in accord, but the California Court of Appeal in *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1455 n.13 (Ct. App. 2006), expressly disavowed *Provencher.* A class action waiver provision thus may be unconscionable in California. Whether it is depends on the facts and circumstances developed during the course of litigation. The district court clearly erred in holding that the clauses (assuming that they are part of the contract at all) are consistent with California policy and therefore enforceable as a matter of law.

Because we find that the district court committed clear errors of law, we turn to the remaining four *Bauman* factors.

2. The first and second *Bauman* factors weigh in favor of granting mandamus relief.[3] If Douglas is forced to arbitrate, he "has no other adequate means" of ensuring that he can continue as the class representative. *Bauman*, 557 F.2d at 654. This would "prejudice[]" Douglas "in a way not correctable on appeal." *Id.*

If Douglas wins the arbitration and is awarded all the damages he asks for, then his individual claim would be rendered moot.[4] Douglas couldn't avoid mootness by moving to vacate the arbitration award solely because he wanted to continue as the class representative. There are only four permissible grounds for vacating an arbitration award: (1) "the award was procured by corruption, fraud, or undue means"; (2) "there was evident partiality or corruption in the arbitrators"; (3) the arbitrators "refus[ed]

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[3] We generally examine the first and second factors together. *See Bauman*, 557 F.2d at 654 (the second factor "is closely related to the first").

[4] If Douglas were to lose the arbitration or were awarded less than he seeks, his claim would not be moot, as he would be able to challenge the district court's order compelling arbitration as part of his appeal of the arbitration award. *See Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 960 (9th Cir. 2007) (reversing a district court's order compelling arbitration when the plaintiff received an arbitration award on a restitution claim but "[t]he arbitrator found for [defendant] on [plaintiff's] other claims").

to postpone the hearing" even when there was sufficient cause to postpone, "refus[ed] to hear evidence pertinent and material to the controversy" or engaged in "other misbehavior"; and (4) "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a). In sum, a party needs to show "affirmative misconduct" or "irrational[ity]" in the arbitration to vacate an arbitration award. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (en banc). Losing the opportunity to continue as a class representative doesn't come close to meeting this standard.

If Douglas's individual claim is rendered moot because it is fully satisfied as a result of the arbitration, he would lose his status as class representative because he would no longer have a concrete stake in the controversy. It is also doubtful that he could appeal the district court's order confirming an award that fully satisfied his individual claim, and he would thus have no opportunity to challenge the district court's order compelling the arbitration in the first place. It is thus entirely possible that the district court's clear error in compelling arbitration would be insulated from appellate review. *Bauman*, 557 F.2d at 654.

3. The fifth *Bauman* factor also favors mandamus relief. The district court's order enforcing new contractual terms when a customer is only given notice of the terms by having the contract posted on the internet "raises new and important problems" and addresses "issues of law of first impression."

Bauman, 557 F.2d at 655. This is the first time any federal court of appeals has considered whether to enforce a modified contract with a customer where the customer claims that the only notice of the changed terms consisted of posting the revised contract on the provider's website. This issue is also of some significance, as it potentially affects the relationship of numerous service providers with millions of customers, and thus deserves immediate resolution.

* * *

Because four of the five *Bauman* factors favor mandamus relief, and only one factor (the fourth) militates against it, we conclude that the balance of factors favors issuing the writ. The district court's order compelling arbitration is vacated.

PETITION GRANTED.

Counsel

David R. Greifinger, The Law Offices of David R. Greifinger, Santa Monica, CA; J. Paul Gignac, Katherine Donoven and Lisa Johnston Nicholes, Arias, Ozzello & Gignac, LLP, Santa Barbara, CA; Howard Andrew Goldstein, Law Offices of Howard A. Goldstein, Van Nuys, CA, for petitioner.

Paul F. Donsbach and Jennifer L. Andrews, Kutak Rock LLP, Irvine, CA; Bartholomew L. McLeay, Jeremy Fitzpatrick and Paul R. Gwilt, Kutak Rock LLP, Omaha, NE, for real party in interest.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOE DOUGLAS, on behalf of himself and all others similarly situated, --- JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated, Petitioner, V. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, TALK AMERICA INC., a Pennsylvania corporation, Real Party in Interest.	No. 06-75424 D.C. No. CV-06-03809-GAF **JUDGMENT**

Petition for a Writ of Mandamus to the
United States District Court for the
Central District of California

TO: The Honorable Gary A. Feess

The Court has GRANTED the petition for Writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the Court filed on July 18, 2007.

FOR THE COURT

Cathy A. Catterson

By: /s/ Eliza Lau
Eliza Lau
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOE DOUGLAS.

JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

TALK AMERICA INC., a Pennsylvania corporation,

Real Party in Interest.

No. 06-75424

D.C. No. CV-06-03809-GAF Central District of California, Los Angeles

ORDER

(Filed May 29, 2007)

Before: KOZINSKI, GOULD and CALLAHAN, Circuit Judges.

This petition for a writ of mandamus raises issues that warrant oral argument. The Clerk shall calendar oral argument for this petition in Pasadena, California on June 7, 2007 at 3:00 p.m. This panel retains jurisdiction over this petition.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-3809 GAF (RCx)

Date October 20, 2006

Title Douglas v. Talk America Inc.

Present: The Honorable **GARY ALLEN FEESS**

Marilynn Morris	None	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: (In Chambers)

ORDER RE: MOTION TO COMPEL ARBITRATION AND STAY ACTION

A. BACKGROUND AND MOTION

Plaintiff Joe Douglas, who contracted with America Online ("AOL") in 1998 for long distance telephone services, became a customer of Defendant Talk America Inc. ("Talk America") in about 2001 when Talk America took over AOL's long distance accounts. Until about 2005, as a customer of Talk America, he received and paid for long distance telephone service. However, he contends that he discovered in 2005 that he was being charged a number of fees that allegedly

were never, or not adequately, disclosed to him. Having become aware of those charges, he then filed this lawsuit for unfair and deceptive business practices, which he brings on his own behalf and as a purported class representative of all persons who were customers of Talk America for the past two years, and a subclass of California residents who were billed for such charges over the past four years. Plaintiff's operative First Amended Complaint ("FAC") asserts claims for violation of the Federal Communications Act, breach of contract, and violation of related California consumer protection statutes.

Talk America now moves under Federal Rule of Civil Procedure ("Rule") 12(b)(1) for dismissal for lack of subject matter jurisdiction, or, in the alternative, to compel arbitration and stay the present action.[1] Talk America contends that Plaintiff's agreement with Talk America contains an arbitration clause that waives his right to pursue claims on behalf of a class

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[1] Though the Ninth Circuit has yet to rule definitively on this issue, district courts have held that motions to compel arbitration may appropriately be styled as motions to dismiss for lack of subject matter jurisdiction. *See Araiza v. Nat'l Steel & Shipbuilding Co.*, 973 F. Supp. 963, 964 (C.D. Cal. 1997) (defendants filed a 12(b)(1) motion to compel arbitration pursuant to collective bargaining agreement); *see also DeGroff v. MascoTech Forming Techs. Fort Wayne, Inc.*, 179 F. Supp. 2d 896, 899 n.2 (N.D. Ind. 2001) ("motion to compel arbitration could also be considered under [Rule] 12(b)(1)"). Lacking clear guidance from the circuit, the Court treats the motion as one to compel arbitration under 9 U.S.C. § 4.

and requires him to pursue his claims in arbitration. Plaintiff argues that he never received a copy of the agreement containing the clause, and that, even if he had received the agreement, the arbitration clause should not be enforced because it is unconscionable. For the reasons discussed below, the motion is **GRANTED**.

B. Issues Presented

The present motion raises three[2] issues for resolution:

1. Whether an agreement containing an arbitration clause can be enforced if the party resisting arbitration was not presented with a written copy of the agreement containing the arbitration clause.

2. Assuming that the arbitration clause is otherwise enforceable, whether the arbitration clause should be construed under California or New York law.

3. Whether, under the applicable state law, the arbitration clause is unconscionable and therefore unenforceable.

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[2] Although technically the first question is whether the arbitration clause would encompass the present dispute, the parties do not dispute its applicability if it is otherwise enforceable. The Court therefore does not discuss that question.

C. Discussion

1. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving interstate commerce and holds that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA further provides that "[a] party aggravated by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4. The court should then "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *Id.* § 3.

When determining whether to compel a party to arbitrate a dispute, a district court may not review the merits of the dispute, but instead must limit its inquiry to: (1) whether a valid agreement to arbitrate exists, and, if it does, (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

2. Plaintiff Is Bound by the Consumer Services Agreement

Plaintiff acknowledges the existence of an agreement with Talk America in his FAC where he

alleges that "[o]n or before July 18, 2005, Plaintiff and Talk America entered into a written telephone service contract." (FAC ¶ 37.) Indeed, he could hardly dispute its existence since he received services for which he paid Talk America over a period of approximately four years. Plaintiff further acknowledges that Talk America's Consumer Services Agreement ("CSA") specifies that "BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT." (Opp. at 5; Herbenick Decl., Ex. A [CSA] at 1.) Among other things, the CSA contains a clause, entitled "Dispute Resolution," which states:

> THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY.

(Herbenick Decl., Ex. A [CSA] at 4.) In addition, the CSA provides a class action waiver provision: "NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER PERSON, OR RESOLVED ON A CLASS-WIDE BASIS." (*Id.* at 5.) Finally, the CSA contains a choice of law provision, in which "[t]his Agreement will be governed by the law of the

State of New York, without regard to its choice of law rules." (*Id.* at 6.)

Despite asserting alleged contract rights against Talk America, Plaintiff contends that he should not be bound by the CSA since he never received a written copy of the document. However, Talk America notes that the web site on which Plaintiff paid his bills contained a link to the CSA, which Plaintiff could have accessed at any time between February 2004 and September 2005. Cases that have addressed this issue in similar circumstances have held that the customer's use of Talk America's long distance service constitutes acceptance of the terms of the CSA. *Crawford v. Talk America, Inc.*, No. 05-CV-0180-DRH, 2005 WL 2465909 (S.D. Ill. Oct. 5, 2005); *see also Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) ("Competent adults are bound by such documents, read or unread.").

The Court is presented with a similar situation in this case. Douglas contracted for long distance telephone services and knew that Talk America had undertaken the obligation to provide those services in 2001. Talk America in fact delivered long distance services to Douglas for approximately four years, and Douglas regularly paid for those services. Talk America provided internet access to the CSA, which Douglas could have read had he wanted to know the terms and conditions under which he was receiving services. Accordingly, the Court concludes that Douglas is bound by the CSA's terms and conditions.

3. New York Law Applies

Where a federal court exercises supplemental jurisdiction over state claims, it will apply the choice of law rules of the forum state. *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (1999). Under California law, "the court must first determine: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law." *Wash. Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 916 (2001). If neither of these tests are met, that ends the inquiry, and the court applies the forum state's law. *Id.* If either test is met, however, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. *Id.* If there is no conflict, the court shall enforce the parties' choice of law provision. *Id.* However, if there is a conflict, the court is to determine whether California has a "materially greater interest" than the chosen state in the determination of the issue, *id.*, in which case California law applies.

i. New York Has a Substantial Relationship to Talk America

A substantial relationship between the chosen state and the parties or their transaction can be found where: (1) a party to the choice-of-law clause is incorporated or has its principal place of business in the chosen state, *Discover Bank v. Super. Ct.*, 134 Cal. App. 4th 886, 891-92 (Ct. App. 2005); (2) where the contract is to be performed in the chosen state or a

party in the dispute resides in that state, *ABF Capitol Corp. v. Berglass,* 130 Cal. App. 4th 825, 835 (2005); or (3) in the state where the contract was executed, *First Pa. Bank, N.A. v. Lugli,* 542 F. Supp. 73, 75 (N.D. Cal. 1982).

Here, Talk America establishes a substantial relationship by asserting that "Talk America had approximately 11,000 local and long distance customer lines in . . . New York." (Callahan Decl. ¶ 5.) Though it is unknown whether this number is a large or small percentage of its nationwide customer base, having 11,000 customers in the state alone establishes that its presence in New York is not de minimis. In addition, one of its four switches that route and connect customer calls is located in New York, while none is located in California. (*Id.* ¶ 6.) A switch helps Talk America perform its end of the contract with its customers by providing telephone service, which means that New York has a substantial relationship to Talk America.

ii. New York Law Does Not Violate Fundamental Policy of California

The relevant fundamental policies here involve arbitration, arbitration agreements, unconscionability, and class action waiver provisions, none of which vary significantly between New York and California. First, both states recognize a strong public policy favoring arbitration. *Broughton v. Cigna Healthplans,*

21 Cal. 4th 1066, 1095 (1999); *Ranieri v. Bell Atlantic Mobile,* 759 N.Y.S.2d 448, 448 (N.Y. App. Div. 2003).

Second, both New York and California courts recognize that arbitration agreements are "valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Discover Bank v. Super. Ct.,* 36 Cal. 4th 148, 163 (2005) (citing 9 U.S.C. § 2); *see Hayes v. County Bank,* 811 N.Y.S.2d 741, 743 (N.Y. App. Div. 2006) (same). Both New York and California law also recognize that "a state court may refuse to enforce an arbitration agreement based on generally applicable contract defenses, such as fraud, duress, or unconscionability." *Discover Bank,* 36 Cal. 4th at 165; *Brower v. Gateway 2000, Inc.,* 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998).

Third, New York and California law have similar approaches to unconscionability defenses. In each state, unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made. *Discover Bank,* 36 Cal. 4th at 160; *Brower,* 676 N.Y.S.2d at 573. Both states also recognize that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required" for unenforceability. *Armendariz v. Found. Health Psychcare Serv., Inc.,* 24 Cal. 4th 83, 114 (2000); *see Brower,* 676 N.Y.S.2d at 574 ("the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable"). Both focus on the same two factors for procedural unconscionability: oppression and surprise.

Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1187 (S.D. Cal. 2005); *Brower*, 676 N.Y.S.2d at 572-73.

Finally, as to class action waiver provisions, New York courts have consistently held that they are not unconscionable and do not violate public policy. *Ranieri*, 759 N.Y.S.2d at 449; *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004). And though *Discover Bank* outlines a test to determine whether a class action provision is unconscionable, it specifically stated that it "[did] not hold all class action waivers [to be] necessarily unconscionable." 36 Cal. 4th at 162; *see also Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) ("In *Discover Bank*, the California Supreme Court made it clear that there is ***no blanket policy*** in California against class action waivers in the consumer context.") (emphasis added).

Thus, because New York law does not conflict with California's fundamental policy regarding arbitration agreements and class action waiver provisions, New York law applies here.

4. Under New York Law, the Arbitration Clause Is Not Unconscionable

"[G]eneral contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (citation omitted). Due to the CSA's choice of law provision, New York law

applies to determine whether the arbitration clause is unconscionable.

Under New York law, both procedural and substantive unconscionability are required to demonstrate that the arbitration agreement is unconscionable. *Brower,* 676 N.Y.S.2d at 573. In other words, there must be "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (citation and internal quotation marks omitted).

a. Procedural Unconscionability

Procedural unconscionability is present when one party "lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high-pressured tactics' and any disparity in the parties' bargaining power." *Id.* (citation omitted).

Here, Talk America was not the only provider of long distance telephone services available to Plaintiff, who had the option to cancel service at any time and sign up with another provider. *See Ranieri,* 759 N.Y.S.2d at 449 (arbitration provision not unconscionable "without offering evidence that he could not have chosen another service provider"). Though Talk America has greater bargaining power than Plaintiff,

that factor "alone does not invalidate a contract . . . when the purchase can be made elsewhere." *Id.* In addition, the CSA itself was only seven pages, and the arbitration clause was typed in the same font size as the rest of the CSA, with portions in caps and bold to ensure that the reader was aware of this provision. In no way could the arbitration agreement be construed as "hidden or tucked away within a complex document of inordinate length." *Brower,* 676 N.Y.S.2d at 573. Thus, because Plaintiff did not "lack any meaningful choice" in entering into the agreement, the arbitration clause is not procedurally unconscionable.

b. Substantive Unconscionability

Here, the only challenge to the substance of the arbitration agreement or the CSA is the class waiver provision. As such, the Court bases its analysis solely on whether the class waiver provision is substantively unconscionable.

Substantive unconscionability is present when "the terms unreasonably favor one party." *Id.* at 574. New York courts have consistently held that contractual waivers of class action rights within arbitration agreements are neither unconscionable nor violative of public policy. *Ranieri,* 759 N.Y.S.2d at 449; *Tsadilas,* 786 N.Y.S.2d at 480. New York courts have specifically noted that "[t]he arbitration provision is enforceable even though it waives plaintiff's right to bring a class action." *Tsadilas,* 786 N.Y.S.2d at 480.

Here, the arbitration clause's class action waiver provision is accepted under New York law. The "fact that the arbitration agreement[] effectively preclude[s] [Plaintiff] from pursuing a class action does not alone render [it] substantively unconscionable." *Hayes*, 811 N.Y.S.2d at 743. Thus, under New York law, the arbitration agreement is enforceable because it is not unconscionable.

D. CONCLUSION

In sum, because Plaintiff is bound by the CSA and the arbitration clause is enforceable under New York law, the Court **GRANTS** Defendant Talk America's motion to compel arbitration and stay action.

IT IS SO ORDERED.

Initials of
Preparer /s/ [Illegible]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated, Petitioner, v. **UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,** Respondent, **TALK AMERICA INC., a Pennsylvania corporation,** Real Party in Interest.	No. 06-75424 D.C. No. CV-06-03809-GAF Central District of California, Los Angeles **ORDER** (Filed Aug. 29, 2007)

Before: **KOZINSKI**, **GOULD** and **CALLAHAN**, Circuit Judges.

Talk America's motion to recall the mandate is denied as unnecessary. *See Ellis* v. *U.S. Dist. Court*, 360 F.3d 1022, 1023 (9th Cir. 2004) (en banc). The petition for rehearing en banc is denied. *See* Fed. R. App. P. 35.

Federal Arbitration Act, 9 U.S.C. § 2-4, 16

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in

the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

* * *

(a) An appeal may be taken from

(1) an order

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

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(2)

No. 07-719

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TALK AMERICA, INCORPORATED,

Petitioner,

v.

JOE DOUGLAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that an existing customer was not bound by a telephone service company's adhesive consumer contract which required individual arbitration, given that this contract was never provided to the existing customer but, rather, was merely posted on the company's website?

II. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that New York law and policy regarding procedural unconscionability (which entirely eliminate the procedural unconscionability defense if a consumer has a choice of alternative service providers) fundamentally conflict with California law and policy regarding procedural unconscionability (which reject the notion that the availability of substitute services necessarily precludes a procedural unconscionability defense)?

III. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that New York law and policy regarding substantive unconscionability (which consider the class action device to be a mere consolidation procedure that may be waived via a contract of adhesion) fundamentally conflict with California law and policy regarding substantive unconscionability (which embrace the class action device as a necessary tool for consumers with small value claims to vindicate their substantive legal rights collectively)?

IV. Did the Ninth Circuit err when it granted a writ of mandamus and ruled as a matter of law that a proposed class representative's stake in the case and controversy would be rendered moot if, before his case reaches the class certification stage, he is awarded his full measure of damages in a compulsory individual arbitration proceeding?

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INTRODUCTION

The law in California is settled on the three issues which underlie Talk America Inc.'s ("Talk America") petition for writ of certiorari ("Talk America's Petition" or "Petition"). First, a consumer cannot be bound by a contract that he/she has never seen or agreed to.[1] Second, a corporation cannot cherry-pick the state law that will govern a dispute with its customers and unilaterally impose its selection on its customers.[2] Third, a class action waiver provision embedded in an adhesive contract that effectively exempts the party with superior bargaining power "from responsibility for [its] own fraud, or willful injury to the person or property of another" cannot be enforced because it violates fundamental California law and public policy.[3]

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[1] *See, e.g., Los Angeles Inv. Co v. Home Sav. Bank*, 180 Cal. 601, 612-613 (Cal. 1919); *Cory v. Golden State Bank*, 95 Cal.App.3d 360, 364-366 (Cal.Ct.App. 1979); *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 89 Cal.App.4th 1042, 1049-1050 (Cal.Ct.App. 2001).

[2] The proponent of a choice-of-law clause must demonstrate either: (1) that "the chosen state has a substantial relationship to the parties or their transaction;" or (2) that "a reasonable basis otherwise exists for the choice of law." *Washington Mut. Bank v. Super. Ct.*, 24 Cal.4th 906, 917 (Cal. 2001) (citation omitted). However, even if one of these tests is satisfied, a court cannot enforce a choice-of-law provision if the opponent of the clause establishes that "the chosen law is contrary to a fundamental policy of California." *Id.* at 917 (citation omitted).

[3] *Discover Bank v Super. Ct.*, 36 Cal.4th 148, 163 (Cal. 2005) (citing Cal. Civ. Code § 1668); *see also Shroyer v. New Cingular*

(Cont'd)

The United States District Court for the Central District of California ruled in a manner contrary to settled California law on all three of these issues. First, the district court held as a matter of law that posting the terms and conditions of a telephone service agreement on a website, without any notice to consumers, is sufficient to establish a consumer's agreement to those terms and conditions. (App. 17, 20.)[4] Second, the district court held as a matter of law that Talk America—a Pennsylvania corporation—could enforce its New York choice-of-law clause against a customer from California. (App. 21-22.) Third, although New York courts "have consistently held that [class action waiver provisions] are not unconscionable and do not violate public policy," the district court held as a matter of law that New York law on the unconscionability of class action waivers does not fundamentally conflict with California law and policy thereon. (App. 24.)

In sum, the Ninth Circuit invoked its mandamus power because the district court's three significant errors of law created an "exceptional" and "extraordinary" circumstance. (App. 6.) *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654 (9th Cir. 1977) (citations omitted). Therefore, because the Ninth Circuit applied

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Wireless Services, Inc., 498 F.3d 976, 982-983 (9th Cir. 2007) (finding that, under certain circumstances, class action waivers in adhesive consumer contracts are unconscionable and, thus, unenforceable under California law).

[4] As used herein, "App." refers to the materials included in the Appendix to Talk America's Petition, pursuant to Rule 24.5 of the Rules of the Supreme Court of the United States.

longstanding, generally applicable California law to remedy the district court's erroneous order compelling individual arbitration under the online version of Talk America's September 2005 consumer services agreement ("2005 CSA"), respondent Joe Douglas ("Douglas") respectfully requests that this Court deny Talk America's Petition in its entirety.

STATEMENT OF THE CASE

In 1998, Douglas "contracted with America Online ["AOL"] for long distance telephone services" at a flat rate without additional nongovernmental fees. (App. 15; ER0121 [Decl. of Joe Douglas].)[5] In or around 2001, Talk America "took over AOL's long distance accounts." (App. 15.)

In 2005, more than seven years after he originally contracted with AOL for long distance telephone services, Douglas terminated his account after he discovered that Talk America had added a variety of extra and unauthorized nongovernmental fees to his monthly telephone bill. (App. 15-16; ER0121 [Decl. of Joe Douglas].) Subsequently, Douglas filed a class action lawsuit against Talk America, wherein he alleged that Talk America routinely imposed undisclosed or inadequately disclosed nongovernmental surcharges on consumers' monthly long distance bills in direct violation of federal law, California state law, and common law. (App. 16; ER0002 [First Amended Complaint].)

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[5] Douglas cites to the certified record (Excerpts of Record or "ER"), pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States.

Talk America filed a motion to compel arbitration and stay litigation at the district court. In its motion, Talk America sought to enforce against Douglas the following provisions contained in a 2005 online version of its CSA: (1) a mandatory arbitration clause; (2) a class action waiver provision; and (3) a New York choice-of-law clause.

The district court found that Douglas never received written notice of the 2005 CSA's terms and conditions—*i.e.*, "the agreement containing [Talk America's] arbitration clause," class action waiver, and choice-of-law clause. (App. 17.) In fact, Douglas did not see Talk America's 2005 CSA until after he initiated the underlying lawsuit.[6] (ER0121 [Decl. of Joe Douglas].) Nevertheless, the district court decided that Douglas was bound by the 2005 CSA's arbitration clause because "Talk America provided [I]nternet access to the CSA, which [Douglas] could have read had he wanted to know the terms and conditions under which he was receiving services." (App. 20.)

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[6] In its Petition, Talk America inaccurately implies that Douglas knew the 2005 CSA existed, but that he simply chose not to review the terms and conditions that Talk America now seeks to enforce against him. (*See* Talk America's Petition at 9.) However, Douglas was unaware of the existence of the 2005 CSA. Thus, Douglas had no reason to visit Talk America's website and engage in a cumbersome analysis of Talk America's online 2005 CSA because, as the district court conclusively determined, Talk America never provided Douglas with notice regarding the terms and conditions of its 2005 CSA which are at issue in this case. (App. 17.)

As required by California's choice-of-law precedent, the district court compared New York's and California's respective "fundamental policies" involving "arbitration agreements, unconscionability, and class action waiver provisions." (App. 22.) The district court held that Talk America's New York choice-of-law clause governed the dispute. The district court reasoned that "New York law does not conflict with California's fundamental policy regarding arbitration agreements and class action waiver provisions" because: (1) in both states, "unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made;" and (2) although class action waivers can be unconscionable in California, there is no blanket policy in California against such waivers.[7] (App. 23-24.)

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[7] While the district court correctly concluded that California does not have a "blanket policy against class action waivers in the consumer context" (App. 24 (citation omitted)), the district court entirely glossed over what the California Supreme Court *did* in fact hold in *Discover Bank*:

> [b]ut when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." *Under these*

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On October 25, 2006, based on the foregoing findings, the district court entered its order granting Talk America's motion to compel individual arbitration and stay the litigation.

Douglas could not immediately appeal the district court's decision, given that an order compelling individual arbitration and staying the litigation is not an immediately appealable order. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 85 n. 2 (2000); 9 U.S.C. § 16(b). Therefore, in order to prevent the harm that would befall him if he were forced to individually arbitrate his small value claims pursuant to an arbitration clause containing an unconscionable class action waiver provision and a New York choice-of-law clause (neither of which he had ever seen or agreed to), Douglas filed a petition for a writ of mandamus with the Ninth Circuit under the All Writs Act. (App. 2.) *See* 28 U.S.C. § 1651.

The Ninth Circuit utilized its five factor balancing test, often referred to as "the *Bauman* factors," to evaluate Douglas' petition for extraordinary relief. *Bauman*, 557 F.2d at 654. Applying this test, the Ninth Circuit granted Douglas' request for mandamus because four of the five *Bauman* factors weighed heavily in favor of issuing the writ. (App. 3, 9-11.)

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> *circumstances, such waivers are unconscionable under California law and should not be enforced.*

Discover Bank, 36 Cal.4th at 162-163 (emphasis added) (citing Cal. Civ. Code § 1668).

Most importantly, the Ninth Circuit found that the third factor—which is a "necessary condition for granting a writ of mandamus" in the Ninth Circuit—was satisfied because "the district court [had] committed [three] clear errors of law." (App. 6, 9.) The district court committed its *first clear error* when it held that Talk America could enforce the arbitration clause, the class action waiver provision, and the choice-of-law clause in its 2005 CSA against Douglas, even though Talk America had never alerted Douglas to the existence of the pertinent terms and conditions of the 2005 CSA. (App. 6 (emphasis added).) "Th[is] error reflects fundamental misapplications of contract law and goes to the heart of [Douglas'] claim." (App. 6.) The Ninth Circuit further found that the district court committed "*two additional errors*" (App. 6 (emphasis added)) in its choice-of-law analysis because the district court misstated and misapplied "California law as to both procedural and substantive unconscionability." (App. 7; *see also* App. 6-7 n. 2.)

According to the Ninth Circuit, the first and second *Bauman* factors also weighed strongly in favor of granting mandamus. In particular, the Ninth Circuit concluded that, if an arbitrator awarded Douglas "all the damages he asks for," the resulting mootness of Douglas' "personal stake in the controversy" would prejudice Douglas "in a way not correctable on appeal"—namely, because Douglas would be unable to continue as a class representative and because he would be unable to appeal the district court's underlying order compelling individual arbitration. (App. 9-10.)

Lastly, the Ninth Circuit found that the fifth *Bauman* factor favored mandamus relief because the district court's order enforcing contractual terms "when a customer is only given notice of the terms by having the contract posted on the [I]nternet 'raises new and important problems' and 'addresses issues of law of first impression.'" (App. 10-11 (citing *Bauman*, 557 F.2d at 655).) As the Ninth Circuit concluded, even if Douglas had visited Talk America's website, he had "no reason to look" at the online 2005 CSA because he never received notice about this CSA from Talk America. (App. 4.) Thus, the Ninth Circuit found that the issue "deserves immediate resolution" because the district court's erroneous holding—which eviscerated longstanding, generally applicable contract principles of notice and assent, and distorted California unconscionability law—could potentially adversely affect "the relationship of numerous service providers with millions of customers." (App. 11.)

REASONS FOR DENYING THE PETITION

The proper resolution of Talk America's Petition does not turn, as Talk America claims, on inapplicable issues such as: the Ninth Circuit's so-called "special" standard of review for mandamus petitions involving arbitration agreements (Talk America's Petition at 3-4); the Best Evidence Rule; California's and the Ninth Circuit's supposed "antagonism toward arbitration" (Talk America's Petition at 2); and/or appellate fact-finding. (*See, e.g.*, Talk America's Petition at 3-8.) Rather, at its heart, Talk America's Petition hinges upon the proper application of deeply-rooted and universally

applicable contract law—including notice, acceptance, and unconscionability—as well as basic mootness principles.

I. THE NINTH CIRCUIT'S STANDARD FOR GRANTING MANDAMUS RELIEF MIRRORS THE STANDARD USED BY OTHER COURTS

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(b) does not authorize interlocutory appeals where a district court grants a motion to compel arbitration and stay the litigation. However, the Ninth Circuit's grant of mandamus did not "contraven[e]" 9 U.S.C. § 16(b)'s Congressional "directive," as Talk America contends, because the Ninth Circuit exercised its mandamus authority under a completely separate statute—the All Writs Act, 28 U.S.C. § 1651. (Talk America's Petition at 3.)

In the All Writs Act, Congress explicitly provides the courts of its creation with the power to "issue all writs" which are "necessary or appropriate." Given the drastic nature of the remedy of mandamus under the All Writs Act, the Ninth Circuit developed the five *Bauman* factors to "cabin [its] power to grant this writ." (App. 2 (citing *Bauman*, 557 F.2d at 654-655).) The *Bauman* factors are derived from this Court's and the Ninth Circuit's precedent dealing with mandamus. *Bauman*, 557 F.2d at 654 ("From those cases [dealing with mandamus] we have identified five specific guidelines.")

In its Petition, Talk America contends that the Ninth Circuit's *Bauman* factors conflict with the standards

utilized by other courts of appeal when evaluating orders compelling arbitration. (Talk America's Petition at 4.) However, even a cursory comparison of *Bauman* with the two cases cited by Talk America debunks this assertion. Like the Second Circuit, the Ninth Circuit's "touchstones of review by mandamus" include the improper judicial usurpation of power, an abuse of discretion, and the presence of significant issues of first impression. *Steele v. L.F. Rothschild & Co., Inc.*, 864 F.2d 1, 4 (2d Cir. 1988); *Bauman*, 557 F.2d at 654-655. Similarly, the Fifth Circuit and the Ninth Circuit both agree that mandamus is available where the district court has ordered arbitration if the mandamus petitioner demonstrates that his/her right to issuance of the writ is "clear and indisputable." *McDermott Int'l Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993); *Bauman*, 557 F.2d at 656.

Talk America further misconstrues *Steele* and *McDermott Int'l Inc.* when it cites these cases for the proposition that other courts of appeal "hold an alleged misapplication of state law generally must be addressed by direct appeal" and that "[an alleged misapplication of state law] is an insufficient basis for granting extraordinary relief by mandamus." (Talk America's Petition at 4.) Indeed, the Second Circuit in *Steele* refused mandamus because it determined that the district court in that case had acted within its power *and*—quite unlike the district court in this case—"*ha[d] applied well-settled principles of law* in reaching its decision" ordering arbitration. *Steele*, 864 F.2d at 4 (emphasis added). Likewise, the Fifth Circuit in *McDermott* acknowledged that "[mandamus] review may be available" to the petitioner, but it ultimately

denied the petitioner's mandamus request because the *petitioner failed to demonstrate a "clear and indisputable" right* to mandamus. *McDermott Int'l Inc.*, 981 F.2d at 748 (emphasis added).

In sum, the Ninth Circuit acted in accordance with this Court's precedent and the precedent of other circuit courts of appeal when it applied the *Bauman* factors and "conclude[d] that the balance of factors favor[ed] issuing the writ." (App. 11.)

II. THE NINTH CIRCUIT'S OPINION AND ORDER CONFORM WITH GENERALLY APPLICABLE CONTRACT LAW

Talk America contends that the Ninth Circuit improperly accorded "special treatment" to the arbitration agreement contained in Talk America's 2005 CSA. (*See, e.g.*, Talk America's Petition at 4-6, 10-11.) On the contrary, the Ninth Circuit simply evaluated the district court's conclusions of law according to contract principles which apply to any contractual provision, regardless of whether the provision at issue involves arbitration.

A. Douglas Was Not Required To Produce A Different CSA Because The Best Evidence Rule Does Not Apply

Federal Rule of Evidence 1002, also known as the "Best Evidence Rule," instructs that "[t]o prove the content of a writing ... the original writing ... is required, except as otherwise provided." Simply stated, the Ninth Circuit did not "abandon" the Best Evidence

Rule or create an exception to the Best Evidence Rule for arbitration agreements (*see* Talk America's Petition at 11) because the Best Evidence Rule had no bearing on its inquiry. Douglas was not seeking to prove—and the Ninth Circuit's ruling did not enforce—the terms and conditions of any particular CSA that existed before Talk America's 2005 CSA. *See* Advisory Committee Notes to Fed.R.Evid. 1002 ("Application of the [Best Evidence Rule] requires a resolution of the question whether contents are sought to be proved.") Instead, Douglas' petition for writ of mandamus and the Ninth Circuit's Order centered on: (1) the district court's erroneous conclusion of law that Talk America satisfied notice requirements by posting the 2005 CSA's arbitration clause, class action waiver provision, and New York choice-of-law clause online (App. 6-9); (2) the district court's erroneous conclusion of law that Talk America satisfied mutual assent requirements by posting the 2005 CSA's arbitration clause, class action waiver provision, and New York choice-of-law clause online (App. 6-9); (3) the district court's erroneous analysis of "California law as to both procedural and substantive unconscionability" (App. 7); and (4) the incurable prejudice that Douglas would experience as a class representative when his substantive claims became moot as a result of the district court's erroneous order compelling individual arbitration of his claims (App. 9).

Similarly, a court does not necessarily comply with the Best Evidence Rule—or, more importantly, generally applicable contract law principles—by "evaluat[ing] the only 'written' contract before it." (Talk America's Petition at 10-11.) A contract's terms and conditions are

not rendered enforceable simply because one party produces the contract to the court (or, for that matter, simply because that party posts those terms and conditions online).

1. Talk America—Not Douglas—Bore the Initial Burden of Proving that the 2005 CSA's Arbitration Clause Constituted an Enforceable Agreement

Talk America asserts that Douglas was required to produce a different CSA because he opposed Talk America's attempt to compel individual arbitration under the 2005 CSA. (*See* Talk America's Petition at 10.) In fact, Talk America contends that Douglas bore the evidentiary burden of "justifying a departure from [the 2005 CSA's] written terms." (*Id.*) However, Talk America misstates the law on this issue.

As this Court has directed, the threshold inquiry is whether a binding arbitration agreement exists according to state law contract principles (*e.g.*, contract formation, revocation, and enforceability). *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Lopez v. Charles Schwab & Co., Inc.*, 118 Cal.App.4th 1224, 1229 (Cal.Ct.App. 2004). Under California law, this means that Talk America—the proponent of the 2005 CSA's arbitration clause—bore the burden of proving the arbitration agreement's validity. [8] *See* Cal. Civ. Code § 1550; *see also Engalla v.*

[8] California law applies because Talk America's New York choice-of-law clause was not part of the parties' agreement and (Cont'd)

Permanente Medical Group, Inc., 15 Cal.4th 951, 972 (Cal. 1997) (a party that seeks to enforce an agreement to arbitrate bears the burden of proving that such an agreement exists).

In other words, Talk America was not required to "prove an absence of unconscionability" (*compare* Talk America's Petition at i), but instead was required to prove that the 2005 CSA's arbitration clause constituted an enforceable agreement under generally applicable California contract law. *First Options of Chicago, Inc.*, 514 U.S. at 944; *Engalla*, 15 Cal.4th at 972. Notably, although Talk America attempts to portray Douglas as a "sophisticated sports agent" who has engaged "in negotiations with companies such as Coca-Cola," Douglas' professional background does not alter or otherwise diminish Talk America's basic responsibility to establish that Douglas—who originally contracted for long distance services with AOL in 1998—received notice of and actually agreed to the 2005 CSA's arbitration clause.[9] (Talk America's Petition at 8.) Therefore,

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(Cont'd)
because California's choice-of-law analysis rendered it invalid. (App. 6-7 n. 2; *see generally* App 3-9.) *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001) (when a federal court sits in diversity jurisdiction, the law of the forum state controls the court's choice-of-law determination). Yet, even assuming *arguendo* that New York law applied, Talk America would still bear the burden of proving that Douglas was bound by the 2005 CSA's arbitration clause. *Samsun Corp. v. Khozestan Mashine Kar Co.*, 926 F.Supp. 436, 439 (S.D.N.Y. 1996).

[9] Furthermore, even if Douglas represented 'famous sports figures, including Olympian Carl Lewis, in negotiations with
(Cont'd)

because merely posting the arbitration clause contained in its 2005 CSA on the Internet is not sufficient to demonstrate that the terms and conditions of the 2005 CSA are part of the parties' contract as a matter of law, the Ninth Circuit held that Talk America failed to meet its burden. (App. 3-6.)

Moreover, even if Talk America had proven the arbitration clause in its 2005 CSA to be enforceable (which it clearly did not) and the burden had shifted to Douglas to "justify [] a departure" from the 2005 CSA's arbitration clause, Douglas would not have been required to produce a different CSA to refute the 2005 CSA's terms and conditions. Rather, Section 2 of the FAA provides that generally applicable state law contract defenses, such as lack of formation, fraud, duress or unconscionability, may be applied to invalidate arbitration agreements. *Ticknor*, 265 F.3d at 937 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996)).

In sum, because the Ninth Circuit's inquiry rested on whether the 2005 CSA's arbitration clause constituted a binding agreement to arbitrate under universally applicable contract principles, the Best Evidence Rule did not apply and Douglas was not obligated to produce or substantiate a different CSA.

(Cont'd)
companies such as Coca-Cola," Talk America does not assert that the 2005 CSA's terms and condition were open for negotiation by Douglas or any other customer. (Talk America's Petition at 8.)

B. Before Ordering The Parties To Arbitration, A Court Must Find That The Parties Agreed To Arbitrate

In its Petition, Talk America maintains that the Ninth Circuit "created a new standard and new timetable" for determining arbitrability. (Talk America's Petition at 11.) However, an analysis of this Court's precedent and the Ninth Circuit's Order granting mandamus reveals the falsity of Talk America's position.

1. The Ninth Circuit Analyzed Talk America's Arbitration Agreement Under the Correct Standards

According to Talk America, so long as the party seeking arbitration produces a contract containing an arbitration clause to the court, the dispute becomes "arbitrable" and must be moved "into arbitration as quickly and easily as possible." (Talk America's Petition at 12 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).) However, before a court can compel arbitration, it must be "satisfied that the making of the agreement for arbitration . . . is not in issue." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 23 n. 27 (quoting 9 U.S.C. § 4). Otherwise stated, "whether or not [Douglas] was bound to arbitrate" is "a matter to be determined by the Court on the basis of the contract entered into by the parties" because the "duty to arbitrate" is of "contractual origin." *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 649 (1986) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964)).

As discussed previously, Talk America bore the burden of proving that Douglas received notice of and agreed to the 2005 CSA's arbitration clause. The Ninth Circuit concluded that Talk America failed to meet its burden because posting the terms and conditions of a contract online falls woefully short of fulfilling the standard contract formation requirements of offer and acceptance. (App. 3-6.) Thus, because Talk America failed to establish a contractual duty to arbitrate, the district court could not compel individual arbitration.

2. In Accordance with *Buckeye Check Cashing* and *Prima Paint*, the Ninth Circuit Had the Authority to Resolve Douglas' Challenge to Talk America's Arbitration Clause

Talk America argues that the Ninth Circuit created a "new paradigm" for evaluating arbitration agreements that offends this Court's decisions in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395 (1967). (Talk America's Petition at 11-12.) Again, an examination of these cases instructs otherwise.

In *Buckeye Check Cashing* and *Prima Paint*, the parties opposing arbitration challenged the validity of the underlying "contract[s] as a whole." *Buckeye Check Cashing*, 546 U.S. at 444; *Prima Paint*, 388 U.S. at 399. In these cases, this Court distinguished between "two types" of "[c]hallenges to the validity of arbitration agreements" under the FAA. *Buckeye Check Cashing*, 546 U.S. at 444. The first type of challenge involves "the validity of the agreement to arbitrate," or the "'making'

of the agreement to arbitrate." *Buckeye Check Cashing*, 546 U.S. at 444; *Prima Paint*, 388 U.S. at 404. The second type of challenge involves the validity of "the contract as a whole." *Id.* A court resolves the first type of challenge; an arbitrator resolves the second. *Id.*

Unlike the parties opposing arbitration in *Buckeye Check Cashing* and *Prima Paint*, Douglas does not dispute (nor has he ever disputed) that he entered into a valid contract with AOL for long distance telephone service in 1998.[10] (*See, e.g.*, ER0092-ER0093 [Douglas' Opposition to Talk America's Motion to Compel Arbitration and Stay Action].) Instead, Douglas opposes the enforcement of the arbitration clause in Talk America's 2005 CSA based upon contract formation principles—*i.e.*, the "'making' of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404. Therefore, because the court (and not the arbitrator) holds the power to determine whether the parties agreed to be bound by an arbitration clause, the Ninth Circuit acted in conformance with this Court's binding authority when

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[10] Douglas' First Amended Complaint reiterates that Douglas entered into a contract for long distance telephone services "[o]n or before July 18, 2005." (ER0011 [First Amended Complaint].) While Talk America scrambles to "make hay" of that statement (*see* Talk America's Petition at 9), the record clearly demonstrates that Douglas actually contracted for long distance telephone services well "*before* July 18, 2005." (ER0011 [First Amended Complaint] (emphasis added).) More specifically, as found by the district court, Douglas "contracted with [AOL] in 1998 for long distance telephone services"—many years prior to the existence of Talk America's online 2005 CSA, which the district court designated as "the agreement containing the arbitration clause." (App. 15, 17.)

it evaluated the arbitration clause contained in Talk America's 2005 CSA and concluded that it was not enforceable against Douglas. *AT&T Technologies, Inc.*, 475 U.S. at 649.

C. The Ninth Circuit's Ruling Did Not Create "A New Paradigm" For The Unconscionability Determination

Talk America argues that the Ninth Circuit's Order requires the parties to "proceed through the 'course of litigation'" before the district court can engage in an unconscionability analysis. (Talk America's Petition at 11 (citing App. 8).) To support its argument, Talk America quotes, in isolation, a statement by the Ninth Circuit that "whether an arbitration clause should be enforced 'depends on facts and circumstances developed during the course of litigation.'" (Talk America's Petition at 5.) In so doing, however, Talk America plainly mischaracterizes the Ninth Circuit's holding.

Douglas asserted the contract defense of unconscionability and, because unconscionability is a state-specific contract defense, the Ninth Circuit utilized California's choice-of-law rules to determine whether New York or California law applied. (App. 6-7 n. 2.) As required by California's choice-of-law analysis, the Ninth Circuit compared California unconscionability law with New York unconscionability law. (App. 6-8.) While so doing, the Ninth Circuit concluded that significant differences exist between the laws of these two states, especially when the arbitration clause at issue contains a class action waiver provision. (*Id.*) Specifically, the Ninth Circuit observed that "[s]uch waivers aren't

substantively unconscionable under New York law;" but, a class action waiver "*may* be unconscionable in California," and "[w]hether it is depends on the facts and circumstances developed during the course of litigation." (App. 8 (citations omitted) (emphasis added).)

When read in context, it becomes patently obvious that the Ninth Circuit's ruling does not require parties to proceed through the entire course of litigation before a court can assess unconscionability, as Talk America would have this Court believe. (*See* Talk America's Petition at 12.) On the contrary, the Ninth Circuit merely repeated generally applicable California contract law, as set forth by the California Supreme Court—namely, that the enforceability of a class action waiver provision, whether it appears in a contract containing an arbitration clause or not, depends upon the circumstances underlying the parties' dispute. *Discover Bank*, 36 Cal.4th at 162-163. For example, a court evaluating a class action waiver provision under California unconscionability law should look at the "facts and circumstances" to determine, among other things, whether "the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages" and whether the party with "superior bargaining power has carried out a scheme to deliberately cheat large amounts of consumers out of individually small sums of money." *Id.*[11]

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[11] Plainly, the "facts and circumstances" upon which unconscionability turns are presented to the court in the parties' briefing on the unconscionability defense.

D. The Ninth Circuit's Decision Regarding Unconscionability And Class Action Waivers Adheres To Precedent

Contrary to Talk America's contention, the Ninth Circuit's finding regarding California's generally applicable unconscionability law did not constitute a "refus[al] to follow this Court's precedent in enforcing an arbitration agreement under 9 U.S.C. § 4 despite the parties' agreement to preclude class actions." (Talk America's Petition at 6 (citing *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).) The explanation for this is simple: the Ninth Circuit based its ruling on 9 U.S.C. § 4's threshold inquiry (that is, whether the parties actually agreed to arbitrate), not on the enforceability of the arbitration clause's class action waiver provision. (App. 3-6.) *See AT&T Technologies, Inc.*, 475 U.S. at 649. In other words, the Ninth Circuit concluded that the 2005 CSA's arbitration clause could not be enforced because Talk America's arbitration clause was not a part of the parties' contract as a matter of law. (App. 3-6.)

Additionally, the Ninth Circuit did not "strik[e] down" the 2005 CSA's arbitration clause because its class action waiver provision "'may be' unconscionable under California law." (Talk America's Petition at 7.) Instead, the Ninth Circuit determined that the district court erred in its unconscionability analysis under California's choice-of-law rules because, *inter alia*, New York and California treat class action waivers drastically differently. (App. 8; *see also* App. 6-7 n. 2.) Specifically, New York law and policy consider the class action device to be merely a waivable procedure. As a result, class

action waiver provisions "aren't substantively unconscionable under New York law." (App. 8 (citations omitted).) In comparison, California law and policy embrace the class action device as a vital tool for consumers to collectively vindicate their substantive legal rights. For this reason, a class action waiver provision "may be unconscionable in California." (App. 8) *See Discover Bank*, 36 Cal.4th at 159, 161 (citations omitted). Therefore, the Ninth Circuit held that the district court "clearly erred" in holding that class action waivers "are consistent with California policy" and "enforceable as a matter of [California] law." (App. 8.)

E. The Ninth Circuit's Correct Application Of California Law Does Not Create A "Split Of Authority"

Talk America also attempts to persuade this Court that the Ninth Circuit's ruling created a so-called "split of authority" on the enforceability of arbitration agreements containing class action waiver provisions. (Talk America's Petition at 5-6.) To support its incorrect position, Talk America lists cases from the Third, Fourth, Fifth, and Eighth Circuits, as well as cases from several state supreme courts, in a footnote string citation.[12] (Talk America's Petition at 6 n.1.) Once again, Talk America's unsupported argument is entirely without merit.

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[12] Notably, this Court recently rejected a petition for writ of certiorari that propounded a similar argument. *Cingular Wireless LLC v. Mendoza*, 126 S.Ct. 2353 (2006).

As a preliminary matter, Congress intended that the FAA "make arbitration agreements as enforceable as other contracts *but not more so.*" *Prima Paint Corp.*, 388 U.S. at 404 n. 12 (emphasis added). Accordingly, a party may oppose an arbitration clause based on any generally applicable contract defense, including unconscionability. *Doctor's Assocs., Inc.*, 517 U.S. at 687. However, the FAA "does not federalize the law of unconscionability or related contract defenses." *Discover Bank*, 36 Cal.4th at 167 (citing *Perry v. Thomas*, 482 U.S. 483, 493 (1987)). Therefore, given the state-specific nature of contract law, Talk America's references to case law from, *inter alia*, Maryland, Texas, and Hawaii (*see* Talk America's Petition at 6 n. 1), are entirely irrelevant to the Ninth Circuit's correct application of generally applicable California contract law[13] to the class action waiver provision embedded in Talk America's 2005 CSA.

Moreover, a close examination of the allegedly contrary circuit court cases cited by Talk America reveals that they are not demonstrative of a "split of authority" because they are completely distinguishable from California law and the issues underlying the Ninth Circuit's Order. For example, the Third Circuit's decision in *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) and the Fifth Circuit's decision in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-175 (5th Cir. 2004) relied upon statutes which

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[13] *See Discover Bank*, 36 Cal.4th at 165-166 (emphasis added) (finding that the principle of unconscionability with respect to class action waiver provisions "applies equally to class action litigation waivers in contracts *without* arbitration agreements as it does to class arbitration waivers in contracts *with* such agreements.")

are not at issue in this case. Specifically, in *Johnson*, the Third Circuit focused on the fact that neither of the putative class' causes of action—namely, the Truth in Lending Act ("the TILA"), 15 U.S.C. § 1601, *et seq.* and the Electronic Fund Transfer Act ("the EFTA"), 15 U.S.C. § 1693, *et seq.*—"confers upon plaintiffs the right to proceed as a class." *Johnson*, 225 F.3d at 369. Similarly, in *Iberia*, the Fifth Circuit found it "highly relevant" that the source of one of the putative class' causes of action—Louisiana's Unfair Trade Practices Act ("the LUTPA")—"does not permit individuals to bring class actions." *Iberia*, 379 F.3d at 174-175.

Unlike the proposed classes in *Iberia* and *Johnson*, Douglas has not filed suit under the LUTPA, the TILA, or the EFTA. Instead, Douglas has sought relief under, *inter alia*, the Federal Communications Act, 47 U.S.C. § 201 ("the FCA") and California's Consumer Legal Remedies Act ("the CLRA"), Cal. Civ. Code § 1750, *et seq.* (ER0012-ER0013 [First Amended Complaint].) In stark contrast to the LUTPA, the TILA, and the EFTA, class actions are permitted under the FCA. Moreover, the CLRA establishes a statutory scheme for consumer class actions in California (Cal. Civ. Code § 1781) and mandates that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ. Code § 1751. These critical statutory distinctions render *Iberia* and *Johnson* wholly inapplicable.

In *Snowden v. CheckPoint Cashing*, 290 F.3d 631 (4th Cir. 2002), the plaintiff—who brought suit under the TILA and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*—argued that the arbitration clause at issue in that case was unenforceable because, absent class action

proceedings, "she [would] be unable to maintain her legal representation given the small amount of her individual damages." *Snowden*, 290 F.3d at 638. The Fourth Circuit rejected this claim because both the TILA and RICO award attorneys' fees to a prevailing plaintiff. *Id.* However, the California Supreme Court has explicitly rejected the notion that "the potential availability of attorney[s'] fees to the prevailing party in arbitration or litigation ameliorates the problem posed by [] class action waivers." *Discover Bank*, 36 Cal.4th at 162. Indeed, in California a class action waiver provision's unconscionability does not hinge upon whether "a plaintiff in arbitration may experience a net loss (including attorneys' fees and costs)," but upon whether the class action waiver provision serves to (among other things) greatly "reduce[] the aggregate liability a company faces when it has exacted small sums from millions of consumers." *Shroyer*, 498 F.3d at 986 (citing *Discover Bank*, 36 Cal.4th at 158-162).

Finally, in *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001), the Eighth Circuit did not even address unconscionability because the party opposing arbitration in that case did not claim that the arbitration clause itself was unconscionable. Instead, the defendants-appellants disputed the viability of the underlying contract as a whole and also asserted that the plaintiffs-appellees had waived their right to arbitration—both of which are questions for the arbitrator to determine. *Id.* (citing *Prima Paint*, 388 U.S. at 403-404; *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 748 (8th Cir. 1986)).

Therefore, the Ninth Circuit's Order does not conflict with the completely inapposite cases cited by Talk America. (Talk America's Petition at 5-6.) Rather, instead of creating a "split of authority," the Ninth Circuit's Order comports with both this Court's binding precedent regarding the FAA and generally applicable California contract law.

III. The Ninth Circuit Remedied The District Court's Misapplications Of Law In Accordance With Fed.R.Civ.P. 52(a) And The *Bauman* Factors

Federal Rule of Civil Procedure 52(a) "broadly requires that [the district court's] findings of fact not be set aside unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). However, "[t]he Rule *does not* apply to conclusions of law." *Id.* (emphasis added). As a result, a reviewing court may "set aside" the district court's conclusions of law if they "rest on an erroneous view of the law." *Id.* In a similar vein, the third dispositive *Bauman* factor authorizes the Ninth Circuit to grant mandamus where "[t]he district court's order is clearly erroneous as a matter of law." (App. 3 (quoting *Bauman*, 557 F.2d at 654-655).)

Here, the district court's determination that Douglas is bound by the online 2005 CSA's arbitration clause, class action waiver provision, and New York choice-of-law clause constitutes a conclusion of law. *Buckeye Check Cashing*, 546 U.S. at 444 (holding that the "'making' of the agreement to arbitrate" is a question of law for the court to determine); *see also First Options of Chicago, Inc.*, 514 U.S. at 947-948. Therefore, the Ninth Circuit

has authority to reject this determination if it resulted from a misapplication of the law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

Talk America claims that the Ninth Circuit "misus[ed] the office of mandamus" and "attempted to make findings of fact as to the existence and terms of a written contract not before the district court." (Talk America's Petition at 13.) But, Talk America misstates the law and the facts. *First*, the Ninth Circuit did not interpret or enforce the terms of any pre-2005 CSA. Rather, as discussed more fully below, the Ninth Circuit simply determined whether Douglas could properly be bound by Talk America's 2005 CSA under generally applicable contract principles. (*Compare* Talk America's Petition at 13; App. 4-6.) *Second*, the district court's factual findings—as well as common sense—dictate that Talk America's 2005 CSA represents a "change" from Douglas' 1998 contract with AOL. Talk America's 2005 CSA did not even exist when Douglas entered into his contract with AOL (an entirely different corporation) for long distance telephone services in 1998. (*See* App. 15.) Furthermore, the district court identified the online 2005 CSA—not AOL's 1998 CSA or any other pre-2005 CSA—"as the agreement containing the arbitration clause." (App. 17.)

A. The District Court Erred In The Application Of Fundamental Contract Law

In this case, the Ninth Circuit properly exercised its mandamus authority because the district court's legal conclusion regarding the enforceability of the three provisions in Talk America's 2005 CSA "rest[s] on an

erroneous view of [contract] law." *Pullman-Standard*, 456 U.S. at 287; *see also Bauman*, 557 F.2d at 654-655. To illustrate with respect to the arbitration clause, the district court made the following pertinent findings of fact: (1) Douglas contracted with AOL for long distance services in 1998 (App. 15); (2) Talk America "under[took] the obligation to provide those services in 2001" (App. 20); (3) Talk America's online 2005 CSA was "the agreement containing the arbitration clause" (App. 17); (4) this arbitration clause sought to both "waiv[e] [Douglas'] right to pursue claims on behalf of a class" and "require[] [Douglas] to pursue his claims in arbitration" (App. 16-17); (5) Talk America never alerted Douglas regarding the 2005 CSA's arbitration clause (App. 17); and (6) Talk America's website "contained a link to the [2005] CSA" (App. 20). Based upon these *findings of fact*, the district court concluded *as a matter of law* that Douglas was bound by the 2005 CSA's arbitration clause because—according to the district court's interpretation of contract law—posting contractual terms and conditions on a website, without more, is sufficient to establish a consumer's agreement to those terms and conditions. (App. 20.)

Upon review of Douglas' petition for writ of mandamus, the Ninth Circuit concluded *as a matter of law*, based upon *the district court's findings of fact* (*i.e.*, that Talk America did not inform Douglas about the existence or availability of its online 2005 CSA), that the 2005 CSA's arbitration clause could not be enforced against Douglas because Talk America could not satisfy fundamental notice and assent requirements. The Ninth Circuit reasoned that even the cases "on which the district court relied" instruct that the service provider

must provide written notice of contractual terms and conditions before a court can infer acceptance of those terms. (App. 5 (referencing *Crawford v. Talk America, Inc.*, No. 05-CV-0180-DRH, 2005 WL 2465909, at *4 (S.D. Ill. Oct. 6, 2005); *Bischoff v. DirecTV, Inc.*, 180 F.Supp.2d 1097, 1103-1106 (C.D. Cal. 2002)).)[14]

Talk America attempts to dismiss the district court's factual finding that Douglas was not notified of the arbitration agreement, and asserts that the district court "properly found the issue was not controlling." (Talk America's Petition at 14 n. 5.) However, as explained by the Ninth Circuit, parties to a contract do not have any legal obligation to seek out and review a contract's terms where the drafting party has provided no notice regarding the existence of these terms. (App. 6.) In essence, the Ninth Circuit remedied the district court's erroneous conclusion of law by finding that it is not enough that Douglas "*could* have read" the 2005 CSA on Talk America's website (App. 20 (emphasis added)), especially when Talk America gave Douglas "no reason to look at the contract posted there." (App. 6.)

B. The District Court Committed "Two Additional Errors" Of Law

In addition to its "fundamental misapplications of contract law" (App. 6), the district court "also committed two additional errors" of law which resulted from the

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[14] The Ninth Circuit also found these cases to be distinguishable because they "involved new customers who necessarily would be on notice that they were required to assent to contract terms as a predicate for using the service." (App. 5.)

district court's misapplication of California's choice-of-law rules. (App. 6; *see also* App. 6 n. 2.) Specifically, the "district court erred in analyzing California law as to both procedural and substantive unconscionability" (App. 7). *See also* Fed.R.Civ.P. 52(a).

First, the district court erred in holding that the 2005 CSA's arbitration clause containing a class action waiver provision "is not procedurally unconscionable (and therefore enforceable [under California law]) because Douglas had meaningful alternative choices for telephone service." (App. 7.) This conclusion of law is erroneous because:

> [i]n California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer—even if the customer has meaningful choice as to service providers.

(App. 8 (citation omitted).)

Second, the district court erred in holding that the 2005 CSA's class action waiver provision "is not substantively unconscionable" under California law. This conclusion is erroneous because it directly conflicts with deep-seated California law and policy. Indeed, while "New York courts have consistently held that [class action waivers] are not unconscionable and do not violate public policy," California courts "have not hesitated to invalidate class action waivers in the appropriate circumstances." (App. 8, 24.) *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1293 (Cal.Ct.App. 2005).

Accordingly, because the Ninth Circuit's ruling corrected the district court's three clear errors of law in conformity with Federal Rule of Civil Procedure 52(a) and the third *Bauman* factor, the Ninth Circuit properly invoked its mandamus power.

IV. The Ninth Circuit Correctly Concluded That An Individual Arbitration Proceeding Would Render Douglas' Class Action Claims Moot And Unappealable

The law is clear: a named plaintiff must have a "personal stake in the substantive controversy" in order to represent the collective interests of a putative class—particularly where the case has not yet reached the class certification stage of litigation. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The reasoning underlying this requirement is that a litigant's right to "employ Rule 23" is procedural in nature, and "ancillary to the litigation of substantive claims." *Id.* If a plaintiff's "substantive claims become moot in the [Article III][15] sense, by settlement of all personal claims for example," a federal court must dismiss the plaintiff's case for lack of jurisdiction. *Id.* Accordingly, the Ninth Circuit correctly determined that, if Douglas were forced to proceed with individual arbitration and if the arbitration award fully satisfied Douglas' individual claim, then Douglas would lose both "his status as a class representative" and his opportunity to appeal the district

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[15] Article III, § 2 of the United States Constitution limits federal court jurisdiction to "Cases" and "Controversies." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980).

court's erroneous order "because he would no longer have a concrete stake in the controversy." (App. 10.) This highly prejudicial result "weigh[ed] in favor of granting mandamus relief" under the first and second *Bauman* factors. (App. 9.)

Talk America wrongly disputes the Ninth Circuit's conclusion and argues that Douglas could directly appeal the district court's erroneous order after the conclusion of his individual arbitration. (Talk America's Petition at 14-15.) Talk America bases its argument on this Court's seminal decisions in *Geraghty* and *Roper*. However, Talk America's argument falls flat because *Geraghty* and *Roper* extend only to a putative class representative's procedural right to *directly appeal the denial of class certification* after his/her claims have been satisfied. Specifically, in *Geraghty*, this Court held that the "mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot." 445 U.S. at 397 (referencing *Sosna v. Iowa*, 419 U.S. 393, 400 (1975)) (emphasis in original); *see also Geraghty*, 445 U.S. at 404 (stating that "[o]ur holding is limited to the appeal of the denial of the class certification motion"). Likewise, in *Roper*, this Court's holding centered on the named plaintiffs' procedural right to appeal the district court's denial of class certification once their substantive claims had expired. *Roper*, 445 U.S. at 335-338.

Unlike the proposed class representatives in *Geraghty* and *Roper*, Douglas' case has not proceeded to the class certification stage of litigation. In fact, Talk America responded to Douglas' First Amended Complaint by swiftly filing its motion to compel

individual arbitration and stay the litigation. (ER001-ER0026 [First Amended Complaint]; ERER0027-ER0048 [Points & Authorities in Support of Talk America's Motion to Compel Arbitration].) Thus, given the procedural posture of Douglas' class action lawsuit against Talk America, neither *Geraghty* nor *Roper* could rescue Douglas' case from dismissal based upon mootness if Douglas proceeds to arbitration and is awarded his full measure of damages.

Moreover, rather than weaken the Ninth Circuit's holding, *Geraghty* and *Roper* buttress the Ninth Circuit's determination that mootness principles would prevent Douglas from directly appealing the district court's erroneous order. Under both *Geraghty* and *Roper*, a putative class representative's case becomes moot "by settlement of all [his/her] personal claims" prior to the class certification stage. *Roper*, 445 U.S. at 332; *see also Geraghty*, 445 U.S. at 396. As a result, if Douglas proceeds to individual arbitration (as ordered by the district court) and "is awarded all the damages he asks for," his "individual claim"—*i.e.*, his substantive controversy—"would be rendered moot." (App. 9.) This "definitive mootness" would "oust[] the jurisdiction of the federal courts" and require "dismissal of [Douglas'] case." *Roper*, 445 U.S. at 335.

In sum, the favorable resolution of Douglas' small value claims through compulsory individual arbitration would rob Douglas of his "status as class representative" and would deprive him of the "opportunity to challenge the district court's order compelling the arbitration in the first place." (App. 10.) Therefore, the Ninth Circuit properly concluded that the first and second *Bauman*

factors favored granting Douglas' petition for extraordinary relief because the mootness of Douglas' claims would plainly "'prejudice' Douglas 'in a way not correctable on appeal.'"[16] (App. 9 (quoting *Bauman*, 557 F.2d at 654).)

CONCLUSION

Talk America has not established that any compelling grounds exist for this Court to grant its Petition. For the reasons explained herein, the Ninth Circuit properly exercised its mandamus authority to remedy the district court's significant errors of law, and the Ninth Circuit did so in accordance with well-established and generally applicable law. Therefore, Douglas respectfully requests that this Court deny Talk America's Petition in its entirety.

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[16] Talk America also repeats its unfounded argument that the Ninth Circuit's mootness analysis—in concert with its use of the *Bauman* factors—stands in conflict with "the decisions of other courts of appeal." (Talk America's Petition at 15.) However, as set forth above, the Ninth Circuit's standard of review for mandamus petitions under the All Writs Act, 28 U.S.C. § 1651, not only matches the standard used in other circuits, but also complies with this Court's precedent.

Respectfully submitted,

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

JOE DOUGLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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I. INTRODUCTION[1]

Respectfully, Respondent Douglas misses the point of Talk America's petition for writ of certiorari. In direct conflict with this Court's precedent and in violation of the office of mandamus, the Ninth Circuit has created a new paradigm and evidentiary standard for arbitration agreements that creates a Hobson's choice for district courts that can only be resolved by an order denying arbitration.

Very recent decisional law from the United States Courts of Appeals for the Third and Ninth Circuits also provides further evidence of a split of authority concerning enforcement of class action waivers in arbitration agreements. Talk America respectfully submits this Court should grant its petition and resolve the important questions presented in this appeal.

II. ARGUMENT

Douglas argues the "Best Evidence Rule ha[s] no bearing on [the Ninth Circuit's] ruling" because "Douglas was not seeking to prove – and the Ninth Circuit's ruling did not enforce – the terms and conditions of any particular CSA that existed before Talk America's 2005 CSA" (Douglas Brief at 12). Douglas' argument is mistaken.

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[1] Terms defined in Talk America's Petition for Certiorari are used herein. "Douglas Brief at __" refers to the Brief in Opposition filed by Douglas.

Douglas admits he and Talk America entered into a "written telephone service contract" (ER0011). Indeed, Douglas specifically pled a "Breach of Written Contract" claim (ER0011-12). Talk America properly submitted the Consumer Services Agreements ("CSA") between Douglas and Talk America to the district court (ER0143-63). Douglas did not offer any contrary written agreement or ask the district court for leave to locate any such contract.

Instead, Douglas *orally recalled* a "long distance service agreement" he signed allegedly containing different terms than the CSA (ER 0121). Because the district court had only the CSA before it and since there was no request by Douglas for leave to locate any other agreement, the district court had no choice or ability to make any comparison with any other written agreement and thus properly compelled arbitration under the CSA.

Contrary to Douglas' suggestion, the district court could find for Douglas only if it accepted Douglas' *recollection* of terms of a written agreement not before the district court. This conclusion violates the Best Evidence Rule and, more importantly, create a special rule for arbitration agreements not applied in a non-arbitration context. The Ninth Circuit's contention the district court erred for failing to find a "*change*" in the terms of the written agreements between the parties is, respectfully, without any factual or legal basis and contrary to the policy favoring arbitration pronounced by this Court.

Further contrary to Douglas' contention, Talk America did not invent the argument that the Ninth Circuit created a new procedure for determining arbitrability (Douglas Brief at 19). The Ninth Circuit's words prove it themselves. The Ninth Circuit stated the determination of whether an arbitration provision should be enforced "depends on the facts and circumstances developed *during the course* of litigation" (App. 8) (emphasis added). Thus, under the rule announced by the Ninth Circuit, any district court faced with whether to compel arbitration of a written agreement when a plaintiff *orally* claims – without proof or seeking leave to produce a different agreement – the written agreement before the district court is different or "change[d]" from the one plaintiff *remembered*, the district court will have no choice but to deny the request for arbitration.

Talk America respectfully submits the Ninth Circuit's new rule makes poor policy. There is no reason to delay arbitrability decisions or to encourage plaintiffs to withhold written agreements in order to continue with litigation and avoid arbitration. Failing to impose a requirement upon a plaintiff to produce a contrary written agreement, if such exists, after a motion to compel arbitration is filed as the Ninth Circuit has done here is at odds with well-established jurisprudence of this Court to move "arbitrable dispute[s] out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. Mercury Constr. Corp.* 460 U.S. 1, 22 (1983).

A. Further Evidence of a Circuit Split

The Ninth Circuit's antagonism to arbitration clauses has continued unabated with its recent decision in *Lowden v. T-Mobile USA, Inc.*, No. 06-35395 (9th Cir. January 22, 2008) striking down a class action waiver provision under Washington law. Notably, the Ninth Circuit acknowledged it was "declin[ing] . . . to follow the Third Circuit's holding" in *Gay v. CreditInform*, No. 06-4036 (3rd Cir., Dec. 19, 2007).

Contrary to the Ninth Circuit, the Third Circuit in *Gay* rejected and refused to follow two Pennsylvania Superior Court decisions holding arbitration provisions prohibiting class arbitration are unconscionable "if there are facts showing that the costs associated with individual versus class-based litigation of their claim against the defendant would result in continuing immunity for the defendant for its wrongful acts." *Id.* at *19 (ellipses and brackets omitted).[2] Stated another way, the Third Circuit properly rejected the same reasoning advanced by Douglas and applied by the Ninth Circuit in this and

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[2] In *Lowden*, while the Ninth Circuit purported to distinguish *Gay* on the ground California and Washington law would find unconscionable only a provision in which "the potential for individual gain is small, [and] few if any plaintiffs will pursue either individual arbitration *or* litigation, thereby greatly reducing the aggregate liability a company faces when it has exacted small sums from millions," *id.* at 854 (emphasis added), Talk America respectfully submits this is a distinction without a difference.

other analogous cases. *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Lowden v. T-Mobile USA, Inc.*, No. 06-35395 (9th Cir., January 22, 2008).

Relying on this Court's decision in *Perry v. Thomas*, 482 U.S. 483 (1987), the Third Circuit rejected the argument that "the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract" because, as the Third Circuit noted, such an argument is not "based 'upon such grounds as exist at law or in equity for the revocation of *any* contract' pursuant to Section 2 of the FAA, and therefore cannot prevent the enforcement of the arbitration provision." *Id.* at *20. The Third Circuit further noted "though the Pennsylvania [cases and Talk America contends the Ninth Circuit's opinion] are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitration may be unconscionable simply because it is an agreement to arbitrate. A finding that the arbitration provisions in those cases are unconscionable can be reached only by parsing the provisions themselves to determine what they provide." *Id.* at *20.

The foregoing decisions only further demonstrate the deep division between the various courts of appeal and state supreme courts regarding the enforcement of class action waivers in arbitration contracts and thus provide a separate and important basis for this Court to grant Talk America's petition.

III. CONCLUSION

For the reasons set forth herein, Talk America respectfully requests this Court grant its petition for a writ of certiorari and hear this appeal.

Dated this 15th day of February, 2008

Respectfully submitted,

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